Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

BERNARD SCHWARTZ,

Petitioner,

v.

DOC'S FOOD STORES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Oklahoma, Division No. 1

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state statute imposing the "loser-pays" rule, under which the loser in a case is required to pay the prevailing party's attorney fees, violates the Due Process Clause of the Fourteenth Amendment, since it substantially burdens the fundamental right of access to the courts and is not supported by a compelling state interest and is not narrowly drawn.

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PETITON FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OKLAHOMA, DIVISION NO. 1

Petitioner Bernard Schwartz respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Oklahoma, Division No. 1, in this case.

OPINION BELOW

The opinion of the Oklahoma Court of Appeals is unreported. It is reproduced, starting at page 1 of the Appendix to this petition.

JURISDICTION

The Oklahoma Court of Appeals issued an opinion dated February 13, 1996, affirming award of attorney fees to respondent, as well as an order on February 22, 1996, for the setting of an appellate attorney's fee. The Supreme Court of Oklahoma denied a petition for certiorari to review the Court of Appeals decision on April 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides: "No state shall deprive any person of life, liberty or property without due process of law."

12 Oklahoma Statutes § 936 provides: "In any civil action to recover on a negotiable instrument, . . . the prevailing party shall be allowed a reasonable attorney fee to be set by the court. . . . "

STATEMENT OF THE CASE

This case arose out of an action in the Small Claims Court in Tulsa, Oklahoma, seeking payment on a $400 check issued by petitioner. The court rendered judgment for respondent on August 16, 1994, for the amount of the check, as well as $67 costs, and $200 in attorney fees.

On August 18, 1994, petitioner filed a Petition for Rehearing and Reconsideration in the trial court which challenged the constitutionality of the attorney fee award. No action has been taken on this Petition. On August 26, 1994, the Journal Entry of Judgment was filed. Petitioner filed a Petition in Error in the Oklahoma Supreme Court on September 22, 1994 – the only method of appeal from a small claims judgment under Oklahoma law. The Petition in Error specifically challenged the award of attorney fees "[b]ecause award of attorney fees to the prevailing party in such an action in Small Claims Court substantially burdens the fundamental right of access to the courts, unsupported by a compelling governmental interest, and hence violates the Constitution of the United States and the Constitution of the State of Oklahoma."

On July 21, 1995, the Oklahoma Supreme Court assigned the case to the Oklahoma Court of Appeals, Division No. 1. That court issued an opinion on February

13, 1996, affirming the judgment of the trial court, including the order "granting . . . prevailing party fees." The Oklahoma Court of Appeals opinion noted that petitioner "challenges the trial court's award of attorney fees." (Appendix 3) It then went on to state that 12 Oklahoma Statutes § 936 authorizes an award of prevailing party attorney fees in such an action and that "[b]ecause the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its award of attorney fees." (*Ibid.*). This was, of course, no answer to petitioner's claim that the statute requiring the loser to pay attorney fees was itself unconstitutional. Understandably perhaps, the Oklahoma Court of Appeals headed its opinion, "NOT FOR PUBLICATION," though it is reproduced starting at page 1 of the Appendix to this petition.

On February 22, 1996, the Oklahoma Court of Appeals ordered the trial court to determine an appellate attorney's fee to be awarded to respondent. On February 26, 1996, petitioner filed a petition to the Oklahoma Supreme Court for a writ of certiorari to the Oklahoma Court of Appeals, Division No. 1. On April 30, 1996, the Oklahoma Supreme Court exercised its discretionary review power by denying, without opinion, the petition for certiorari.

REASONS FOR GRANTING THE WRIT

This case may appear a piddling one so far as the amount at stake is concerned. But it raises an important constitutional issue that is bound to grow in consequence

because of the widespread movement for legislative enactment of the loser-pays rule in a wide variety of civil cases. As will be shown, such a rule unconstitutionally burdens the fundamental right of access to the courts. It "chills" the right to bring or defend lawsuits. Instead, in the recent words of the Ninth Circuit, for those without deep pockets who have to "hurdle an attorneys' fee barrier . . . [p]utting up with a little injustice might be better." *Moore v. Local 569 of International Brotherhood of Electrical Workers*, 53 F.3d 1054, 1058 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 908 (1996).

I. THE DECISION BELOW IS INCONSISTENT WITH A RECENT NINTH CIRCUIT DECISION.

The Ninth Circuit decision in the *Moore* case struck down a provision under which any party unsuccessfully challenging an arbitration decision had to pay the attorney fees of the prevailing party on the ground that it violated the right to institute a court action – a right "clearly intended to preclude restraints" upon the right "to seek relief from courts." *Id.* at 1056. According to the Ninth Circuit, such "a fee provision . . . would serve to chill . . . rights to contest the results . . . in court." *Id.* at 1057.

It is recognized that the *Moore* fact pattern was not on all fours with that in the instant case, since the provision for shifting attorney fees there was contained in a collective bargaining agreement and plaintiff relied upon a statutory right to bring a court action. Yet the *Moore* decision is surely relevant to a statute requiring the loser-pays rule which burdens the constitutional right of access

to the courts. Particularly pertinent is the Ninth Circuit's language (in small part already quoted):

> Despite suspicions that appellate judges do not understand the real world, we do understand that the threat of attorneys' fees can be a real deterrent to the assertion of rights. They can be thought of as a kind of penalty. . . . They can even become oppressive and 'disproportionate to the magnitude and importance of the causes in which they are taxed. . . . ' *Alyeska Pipeline Service Co. v. Wilderness Soc'y*, 421 U.S. 240, 252 n. 24 (1975) (citation omitted.) Similarly, we have recognized that the possibility of being subjected to large fee awards if they lose does undercut [the] desire and ability to pursue their causes. . . . All of this can even be true if the plaintiff is pretty, or very, sure that he is correct. It would take a hearty soul with an awfully important principle at stake to run the risk of, say, a . . . fee award. *Putting up with a little injustice might be better. Id.* at 1058 (Emphasis added).

II. AWARD OF ATTORNEY FEES TO THE PREVAILING PARTY IN THIS ACTION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SINCE IT SUBSTANTIALLY BURDENS THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURTS AND IS NOT SUPPORTED BY A COMPELLING GOVERNMENTAL INTEREST AND IS NOT NARROWLY DRAWN.

If what the Ninth Circuit says applies in a case involving a statutory right to seek court relief, it should apply as well in the instant case involving a *constitutional*

right of access to the courts – a *fundamental* right which requires the strictest standard of scrutiny.

It has been settled by this Court that access to the courts is a fundamental right and that restrictions upon such a right are to be reviewed under a standard of strict scrutiny. *Boddie v. Connecticut*, 401 U.S. 371 (1971). The courts have "recognized the right of access to the courts as declared in *Boddie* and rejected the view that *Boddie* should be limited to divorce cases." *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2, 5 (Alaska 1992) (dissent in part). *Boddie* is particularly applicable "where the state makes judicial decision the only lawful means of resolving the underlying dispute." Tribe, *American Constitutional Law* 1462 (2d ed. 1988). See *United States v. Kras*, 409 U.S. 434, 445 (1973) ("exclusiveness of court access and court remedy . . . a potent factor"). This means that legislative restrictions upon a fundamental right such as "the fundamental right to equal litigation opportunity", Tribe, *supra* at 1461, violate the United States Constitution unless they are supported by a compelling state interest. "Since the classification here touches on [a] fundamental right . . . , its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

This is, of course, true in both equal protection cases such as *Boddie v. Connecticut, supra*, and due process cases such as this case, see Rehnquist, J., dissenting, in *Roe v. Wade*, 410 U.S. 113, 173 (1973), as well as in cases involving other fundamental constitutional rights, *Shapiro v. Thompson, supra*.

The loser-pays requirement does substantially burden the right of access to the courts. This is true even though the requirement does not prohibit anyone from bringing or defending a case. As the Ninth Circuit puts it: "We are told the employee can sue all he wants, he just had better be successful. If he is not, he must pay out a great deal of money." *Moore v. Local 569*, 53 F.3d at 1058.

It can perhaps be argued that requiring attorney fees to be paid to prevailing parties furthers the state interest in reducing litigation by deterring frivolous lawsuits and defenses. Even if that state interest is substantial, in this case the interest is not being furthered by a statute that is narrowly drawn – i.e., aimed only at frivolous litigation. Instead, the relevant Oklahoma legislation "has too much the flavor of throwing out the baby with the bath water." *Barr v. Matteo*, 360 U.S. 564, 589 (1959). It is not aimed only at meritless litigation; instead, it is so overinclusive that it sweeps all actions coming under the fee-award statute within its purview.

The effect of awarding the prevailing party's attorney fees, particularly in a Small Claims Court case, is to deter, if not suppress, the assertion of rights by the litigant without a deep pocket. The basic policy behind the general refusal to apply the so-called English rule awarding attorney fees to lawsuit winners has been stated by this Court: "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

The award of attorney fees clearly has an adverse effect upon the right of access to the courts. "For where in order to seek judicial remedies, a plaintiff must risk the liability for the full amount of attorney's fees the other side sees fit to incur, it takes little imagination to foresee that the size of a party's bank account will have a major impact on his access to the courts." *Bozarth v. Atlantic Richfield Oil Co.*, 833 P. 2d at 4.

The same point is made in a Report of the American Bar Association Section of Litigation, submitted to the House of Delegates last year:

> First, and most important, it undermines access to the . . . courts by the middle class and the poor . . . the fact that the individual or small company might be liable not just for their lawyer's fees but for double those fees means that the access to the courthouse will be reduced.
>
> The rule is in effect a regressive tax on the right to litigate. . . .
>
> The problems with loser-pays legislation were best highlighted by the Federal Courts Study Committee chaired by Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals . . . "Although sometimes advocated, a general rule making losing parties fully liable for the winners' reasonable attorney fees is a radical measure that would be inconsistent with traditional American attitudes toward access to courts. Such a rule would work harshly in close cases, especially when a party advocates a position that is reasonable but is nevertheless unsuccessful. It might excessively discourage parties with plausible but not clearly winning claims, particularly when a prospective party is risk

> averse – as is likely to be true of middle-class persons who cannot risk a big loss. . . . "

It is significant that a leading English periodical, *The Economist*, recently called for the abandonment of the loser-pays rule in the country of its origin. As reported in Lewis, *Tilting the Scales*, *New York Times*, February 3, 1995, p. A19,

> "Enormous numbers of mostly middle-class people" simply cannot use the courts, The Economist said, because they must pay for the other side's lawyers if they lose. "For most people this means that they are risking financial ruin."
>
> Today in Britain, The Economist said, "only the very wealthy can afford the costs and risks of most litigation. This offends one of the most basic principles of a free society: equality before the law."

The attorney fees awarded in a small claims case such as this may be small in amount. But that may not be the case in other actions. Indeed, the loser-pays rule often requires the litigant "to risk enormous fee awards." *Moore v. Local 569*, 53 F.3d at 1057. Thus, the district court in *Moore*, upheld an award of $244,104.01 against the union member who had brought the action. Similar large awards were made in two recent cases in Alaska, which had adopted a general loser-pays rule. In the first, a discharged oil company employee, who had repeatedly complained about unsafe company practices, sued, claiming that his firing was in retaliation for whistle-blowing. Defendant won the case and an award for $76,000 in attorney's fees was upheld, though the court did state

that such an award was "disturbing." *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d at 3.

The second case was also a wrongful termination case won by the employer. This time the court upheld an award of $117,251 in attorney's fees. *Van Huff v. Sohio Alaska Petroleum Co.*, 835 P.2d 1181 (Alaska 1992).

Can it be doubted that future discharged whistle-blowers and other employees will be deterred from bringing and defending even meritorious cases when they know that they will incur the risk of such large attorney-fee awards? In the words of another Alaska opinion, "Foreknowledge that such a sizeable sum would be awarded as attorney's fees in the event of her losing . . . could well have constituted an impediment to access to the courts preventing litigation of an issue which she had every right to have resolved." *Sloan v. Atlantic Richfield Co.*, 552 P.2d 157, 162 (Alaska 1976) (dissent).

This statement is particularly appropriate in the instant case, where the loser-pays rule has been applied in a Small Claims Court case. Where the amount in controversy is so small, the knowledge that attorney fees can be assessed will normally have a conclusive impact upon the risk-averse party, particularly one without a deep pocket. Rather than run the risk, even a meritorious case will normally not be litigated.

Neither the interest in deterring litigation, nor any other purpose behind the loser-pays rule is a *compelling* state interest sufficient to override the fundamental right of access to the courts protected by the Due Process Clause of the Fourteenth Amendment.

III. THE QUESTION PRESENTED IS AN IMPORTANT ONE WHICH WARRANTS THIS COURT'S REVIEW.

The constitutional question presented by this petition is a significant one that has never been decided by this Court. Moreover, it is one that is becoming increasingly important, in view of the recent movement to limit access to and damages awarded by the courts. This Court should lead the way and use this case to decide the constitutionality of loser-pays statutes that restrict the right of access to the courts.

The Ninth Circuit has urged that the courts "must be vigilant in assuring that rights of access to the courts are not to be watered down, but the attorneys' fee provision . . . has just that effect." *Moore v. Local 569*, 53 F.3d at 1058. See also *Service Employees International Union v. Local 1199*, 70 F.3d 647, 654 (1st Cir. 1995): "courts must be ever vigilant in protecting that right [of access to the courts] against indirect and subtle devices as well as against direct and obvious limitations."

Shall it be said that this Court is less vigilant than the Federal Courts of Appeals?

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

DIVISION NO. I

DOC'S FOOD STORES, INC., Appellee,	)	
vs.	)	Case No. 84,368
BERNARD SCHWARTZ, Appellant.	)	(Filed Feb. 13, 1996)

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE EDWARD J. HICKS, JUDGE

AFFIRMED

Bernard Schwartz,
Tulsa, Oklahoma, Pro Se,

James H. Ferris,
John W. Cannon,
Moyers, Martin, Santee, Imel & Tetrick,
Tulsa, Oklahoma, For Appellee.

MEMORANDUM OPINION

Opinion by Larry E. Joplin, Judge:

Appellant Bernard Schwartz seeks review of the trial court's order granting judgment to Appellee Doc's Food Stores, Inc. (Store) in Store's action against Schwartz to collect on a check issued by Schwartz to a third-party and cashed by Store, but on which check Schwartz had

ordered payment stopped. In this appeal, Schwartz challenges the constitutionality of an award of attorney fees to Store in this small claims action; the constitutionality of the appellate filing fee; the trial court's admission of allegedly incompetent/hearsay evidence; and the trial court's finding of Store as a good faith holder in due course. Having reviewed the record, we find no error as alleged and affirm the trial court's judgment.

Briefly stated, Schwartz hired the third party, Garrison, to care for Schwartz's ailing wife. Schwartz testified that after two and one-half days of employment, Garrison demanded payment of $400.00. According to Schwartz, he argued with Garrison over the amount but ultimately executed a check payable to Garrison for the amount requested. The next day, a Saturday, Garrison obtained a "stop payment" from his bank on the check to Garrison. On the same Saturday, Garrison presented the check to Store for payment, and Store without notice of the stop payment order cashed the check. When the payor bank refused to honor the check, Store brought the instant small claims action against Schwartz to recover the amount of the check.

After hearing, the trial court found that Store occupied the status of a good faith holder in due course of Schwartz's check, and on that basis granted judgment to Store for $400.00. The trial court further ordered Schwartz to pay attorney fees in the amount of $200.00 and court costs of $67.00. Schwartz moved for reconsideration which the trial court denied. Schwartz appealed and the matter stands submitted on narrative statement. Rule 1.22, Rules of Appellate Procedure, 12 O.S. 1991, Ch. 15, App. 3.

Schwartz first challenges the trial court's award of attorney fees. We agree with Schwartz that under the American Rule, the prevailing party is not entitled to attorney fees *unless provided for by contract or statute. See, e.g., Sisney v. Smalley,* 690 P.2d 1048 (Okla. 1984); *Okla. Publishing Co. v. Miskovsky,* 654 P.2d 596 (Okla. 1982). Under the Oklahoma Small Claims Procedure Act, 12 O.S. 1991 §1751 et seq., any statute providing for an award of attorney fees applies in small claims action so long as an attorney makes an appearance in the case. 12 O.S. §1764. In that regard, Oklahoma statute permits an award of prevailing party attorney fees in an action to recover on a "negotiable instrument." 12 O.S. 1991 §936. The definition of "negotiable instrument" includes a check. 12A O.S. 1991 §3-104.

Schwartz asserts that 12 O.S. 1991 §937 controls all actions to collect on a check, arguing that prevailing party attorney fees may only be granted in actions on checks returned for insufficient funds or no account. However, we believe a full reading of this statute reveals our legislature's intent to create only a special notice provision for those classes of returned checks, not a limitation on an award of prevailing party attorney fees restricted to actions on those classes of returned checks. Accordingly, we hold that in all other actions to recover on a negotiable instrument, including a check returned for reasons other than the two enumerated in 12 O.S. §937, 12 O.S. §936 authorizes prevailing party attorney fees to be taxed as costs. Because the legislature has specifically provided for attorney fees in cases such as the instant case, we cannot say the trial court erred in its award of attorney fees. *See, e.g., Firemen's Ins. Co. of*

Newark, N.J. v. Renegar, 856 P.2d 595 (Okla.App. 1993) (trial court's judgment regarding attorney fees will not be disturbed absent an abuse of discretion).

Schwartz next challenges the constitutionality of the appellate filing fee requirement from a judgment in a small claims action, arguing that the required filing fee posts an unconstitutional barrier to the appellate process. On this issue, we note that our legislature – although generally requiring a filing fee for appeal of civil cases – has specifically provided an alternate avenue for the filing of appeals by those unable to pay the requisite filing fee. 20 O.S. 1991 §15. Schwartz made no claim for such relief in the present case and, in fact, paid the appellate filing fee, but a statute may not be attacked on constitutional grounds by one not injured thereby. *Dablemont v. State of Oklahoma, ex rel. Department of Public Safety,* 543 P.2d 563 (Okla. 1975). Schwartz having suffered no injury in the alleged particular, we consequently reject Schwartz's constitutional challenge.

Schwartz next asserts error by the trial court in allowing allegedly incompetent/hearsay as "the sole evidence" to support the trial court's determination that store honored and negotiated the subject check in good faith, arguing that reliance on such hearsay testimony deprived him of his constitutional right to confront witnesses. Specifically, Schwartz complains of testimony by Store's owner that his employee knew Garrison personally and had previously cashed checks for Garrison, without testimony by the employee to that effect.

On this issue, we first note that the agreed narrative statement includes Store owner's testimony that he personally knew Garrison as a regular customer. Thus, we cannot say, without a record to the contrary, that the testimony targeted by Schwartz constituted the sole evidence in support of the trial court's findings. Second, the the [sic] small claims procedure seeks to render fair, impartial and speedy justice, with the hearing and disposition of each action "informal." 12 O.S. 1991 §1761; *Black v. Littleton*, 532 P.2d 486 (Okla.App. 1975). Accordingly, the small claims court is not bound to adhere to the strict rules of evidence when such adherence interferes with the speedy and just determination of the issues. *Black*, 532 P.2d at 487. Moreover, the record bears out no objections by Schwartz at trial to the admission of the challenged testimony. We consequently find no abuse of discretion by the trial court in the admission of the questioned testimony as to require reversal.

Finally, Schwartz complains of the trial court's determination that Store stood as a good faith holder in due course of the check and, as such, entitled to recover thereon. Specifically, Schwartz asserts Store failed to exercise good faith or to observe reasonable commercial standards by honoring and negotiating the subject check without contacting either Schwartz or his bank in order to determine the validity of the check. 12A O.S. 1991 §3-103(a)(4) (definition of "good faith"); 12A O.S. 1991 §3-302(a)(2) (requirements of "holder in due course"). Alternatively, Schwartz argues that Store lost its status as holder in due course because the check was allegedly obtained by duress or illegality. 12A 3-305(A)(1) (defense of duress or illegality).

However, application of each of these provisions depend on proof of each of the respective elements. Thus, because application of these statutory provisions constitute questions of fact for the trier of fact, inasmuch as this matter stands submitted on narrative statement, we cannot say from review of the narrative statement that the trial court's express or implicit conclusions (1) that Store occupied the status of a good faith holder in due course of Schwartz's check, (2) that Store acted in a commercially reasonable manner, and/or (3) rejecting Schwartz's duress/illegality defenses lacks the requisite competent evidentiary support. *See, e.g., American Fertilizer Specialists, Inc. v. A.J. Wood, Jr.*, 635 P.2d 592, 593 (Okla. 1981); *Anglo-American Clothing Corp. v. Marjorie's of Tiburon*, 571 P.2d 427, 430 (Okla. 1977).

Finding competent evidentiary support for the trial court's judgment and the trial court's award of attorney fees unaffected by error of law or abuse of discretion, we consequently hold the orders of the trial court granting judgment and prevailing party attorney fees to Store should be and therefore are AFFIRMED.

JONES, P.J. AND GARRETT, J., CONCUR.